IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 673 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANTU SNKARLAL KHATRI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 673 of 1994

MR NN PRAJAPATI for appellant

Mr K C Shah, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/04/2003

ORAL JUDGEMENT

This is an appeal under section 374 of the Code of Criminal Procedure, 1973 against the judgment and

conviction order dated 16.4.1994 recorded by the learned Addl.Sessions Judge, Panchmahals camping at Dahod in Sessions Case No.117/1993 whereby the learned trial Judge convicted the present appellant for an offence punishable under section 25(1-AA) of the Arms Act (for short, 'the said Act') and sentenced him to suffer R.I. for seven years. The trial court also directed the appellant to pay fine of Rs.100/- and in default of payment of fine, he was required to undergo further R.I. for 10 days. The facts of the case leading to the said Sessions Case may be briefly stated as follows:

2. For an offence punishable under section 326 of IPC, a case was registered against the present appellant being Dahod Town Police Station C.R. No.48/93. The appellant was wanted in the said matter. The second PSI of the said police station B R Ganava received an information that the present appellant was found sleeping under eucalyptus trees near Dahod and that he was also in possession of a country made hand gun. Therefore, the said PSI, along with other police officials, went to the said spot and when they reached the said place, the appellant could notice them coming to him and therefore, he tried to run away. The appellant was chased and was apprehended. His personal search was carried out and during the course of the said personal search, country made hand gun was found in his possession. A knife was also found in his possession, which was seized in the aforesaid offence being CR No.48/93. FIR was filed by Mr B R Ganava on 3.5.1993 against the present petitioner for offence under section 25(1-AA) and 29 of the said Act stating that the appellant was found in possession of a country made hand gun and he had no licence for possessing the same and thereby he committed the offences as aforesaid. After carrying out the investigation, charge sheet was filed and ultimately the case was committed to Sessions Court being Sessions Case No.11/93. After following due procedure, evidence was recorded and at the conclusion of the evidence, further statements were recorded, arguments were heard and the appellant was found guilty for the said offence and after hearing the quantum of punishment, the trial court inflicted the aforesaid punishment on the appellant. Feeling aggrieved by said judgment and conviction order passed by the trial court, the appellant has preferred this appeal before this court. It has been contended here that the trial court has overlooked provisions of section 39 of the said trial court to hold the appellant guilty. That therefore, the judgment and conviction order are illegal and erroneous and deserve to be set aside. The present appellant, therefore, prayed that the appeal be allowed

and the judgment and conviction order be set aside and the appellant be acquitted outright.

3. At the time of receipt of the appeal, it was ordered to be admitted and the appellant was ordered to be enlarged on bail. At the final hearing, Mr N N Prajapati, learned Advocate appeared on behalf of the appellant, on his appointment as Advocate in legal aid. Mr K C Shah, learned APP appeared for the State. I have heard the learned Advocates for the parties and they have taken me through the evidence and judgment of the trial court. It has been contended on behalf of the appellant that there was non-compliance of provisions made in Section 39 of the said act. Section 39 may be reproduced for ready reference:

> "39. Previous sanction of the District Magistrate necessary in certain cases - No prosecution shall be instituted against any person in respect of any offence under section 3 without the previous sanction of the District Magistrate."

4. The trial court has observed during the course of the judgment in para 11 at page 71 that the present case falls under section 25(1AA) and not under section 3 of the said Act and, therefore, the question of sanction would not come into play.

5. It would, therefore, be necessary to refer to the provisions of section 3 as well as of section 25(1AA) of the said Act. The said two provisions are reproduced hereunder:

> "Section 3 - Licence for acquisition and possession of firearms and ammunition : (1) No person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:"

> "Section 25 (1AA) Whoever manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and

shall also be liable to fine."

6. If we read the provision contained in section 25 (1AA) of the said Act, it would be extremely clear that the said provision will come into play only when a person manufactures, sells, transfers, converts, repairs, tests or proves or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arm in contravention of section 7. In the present case, we find that the prosecution has not come out with a case that the appellant possessed the said weapon for the purpose of sale, transfer, conversion, repair etc. as required by section 25 (1AA) of the said Act. The charge can also be gathered at page 13 which shows that the appellant was found in illegal possession of country made hand gun and he had acquired the same on purchase illegally. So two things come out in the charge. First is that the appellant was found in illegal possession of a country made gun. Second is that he has illegally purchased the same from an unauthorised person. On going through the charge and on going through section 25 (1AA) of the Act, it becomes clear that the charge framed against the appellant does not fall within the four corners of section 25(1AA) of the said Act, since it is not the case of the prosecution that the appellant possesses the said weapon for the purpose indicated in section 25 (1AA) of the said Act or for any of the purposes narrated therein. In that view of the matter, the present case would not fall within the four corners of section 25(1AA) of the said Act. Then, we can turn to section 3 of the said Act, which has been referred to hereinabove. Sub-section (1) of section 3 makes it clear that if any person acquires or carries any firearm or ammunition without a licence, then he would be treated to be guilty. In the present case, we find that the charge against the appellant was that he was found in illegal possession of a country made hand gun. Looking to the charge and looking to the provisions made in section 3 of the said Act, it can be gathered that the case of the prosecution would fall within the four corners of section 3 of the said Act. It is pertinent to note that so far as section 3 of the said Act is concerned, the offence would be committed under the provisions of the said Act, as soon as a person acquires or has in possession or carries any firearm unless he holds, in this behalf, a valid licence issued in accordance with the provisions of the said Act and the rules made thereunder. On a bare reading of the charge and the charge sheet papers, it reveals that the allegations made before the trial court against the

appellant was that the appellant possessed or acquired the said hand gun illegally without pass or permit or licence.

7. For this purpose, we may refer to the evidence also. PW 1, Ranjitbhai Ambalal, Exh.9 is a panch witness in whose presence the muddamal arm was seized from the possession of the appellant. He has produced panchnama in support of his evidence at Exh.10. Then there is the evidence of Haribhai Limbabhai, Exh.12. He was working as Head Constable and on information, he proceeded along with the informant PSI to the spot, who also seized the muddamal hand gun which was found from the possession of the appellant and he did not have any pass or permit or licence for possessing the same. PW 3, B R Ganava was the PSI who, on receiving the information, had gone to the spot with the previous witness. He also says that the appellant was found possessing the hand gun without any licence. FIR filed on 3.5.93 and produced on record also supports the case of the prosecution. No other witness was examined by the prosecution. Therefore, it was the case of the prosecution right from the stage of investigation and at the trial that the appellant was found in possession of muddamal hand gun without any licence, pass or permit. The FSL report produced on record shows that the said hand gun was tested in the past and therefore, learned APP has also argued that the appellant had tested the said firearm and, therefore, it may be treated that he has committed an offence under section 25(1AA) of the said Act. There is no charge framed against the appellant stating that the appellant had tested or used the said firearm. There is no evidence on record to show that the appellant had tested or used the firearm. It may be that the appellant may have purchased the said firearm from someone whom may have tested or used it. Any way, the evidence does not disclose that the appellant had used or tested the said firearm before it was found from his possession. Therefore, the prosecution has failed to make out an offence punishable under section 25(1AA) of the said Act against the appellant.

8. In that view of the matter, the only offence with which the appellant has been charged and the offence for which he has been convicted can be said to be an offence punishable under section 3 of the said Act and, therefore, the provisions contained in section 39 of the said Act will operate which clearly shows that the prosecution cannot be instituted for an offence punishable under section 3 of the said Act without previous sanction of the District Magistrate.

9. In the present case, no such sanction was obtained from the District Magistrate and there is no dispute about the same. Therefore, the very basis of the case of the prosecution goes away and, therefore, in absence of a valid sanction obtained from a District Magistrate, the case against the appellant could not have been instituted before the trial court and, therefore, the trial court had no jurisdiction to entertain the said case before it in absence of valid sanction. In that view of the matter, the trial court has committed an error of law in convicting the appellant without having on record a valid sanction obtained from the District Magistrate. I am of the view that the trial court has also committed an error in holding that the appellant had committed an offence punishable under section 25(1AA) of the Arms Act. I am also of the view that the trial court ought to have recorded a finding that the offence which can be said to have been committed by the appellant would be one punishable under section 3 of the said Act and not under section 25(1AA) of the said Act. In above view of the matter, the judgment and conviction order recorded on the aforesaid finding is illegal and, therefore, they are required to be quashed and set aside. At this stage, I have also given thought on a probable argument that the case should be remanded and in the meantime, sanction can be obtained. The matter is an old one. The offence is said to have been committed by the present appellant as back as on 3.5.1993. Ten years have already gone. Considering the nature of offence and considering the facts and circumstances of the case, I am of the view that this is not a fit case for remanding the same for fresh trial.

10. For the foregoing reasons, the appeal is allowed. The judgment and conviction order recorded by the trial court are set aside. The appellant is held to be not guilty for the offence punishable under section 25(1AA) of the Arms Act and is ordered to be acquitted of the said offence. The appellant is on bail and, therefore, his bail bonds are cancelled. The surety stands discharged. It is made clear that if the appellant is required in connection with any other offences then naturally, this judgment would not come in the way of the State in prosecuting the appellant for the said offence in accordance with law.

16.4.2003 [D P Buch, J.]

msp